

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Ernesto Bustos	)	Facility ID No. 54983
Licensee of Station WTBL-CD	)	NAL/Acct. No.: 201341420009
Lenoir, North Carolina	)	FRN: 0021349188

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 14, 2014****Released: October 15, 2014**

By the Commission:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we dismiss in part and otherwise deny the July 18, 2014 Application for Review filed by Ernesto Bustos (the “Licensee”), licensee of Station WTBL-CD, Lenoir, North Carolina (the “Station”). The Licensee seeks review of a Memorandum Opinion and Order<sup>1</sup> issued by the Video Division, Media Bureau (the “Bureau”) denying reconsideration of a Forfeiture Order<sup>2</sup> which found that the Licensee was liable for a \$13,000 forfeiture for his apparent willful and repeated violations of Section 73.3526(e)(11)(iii) of the Commission’s rules<sup>3</sup> for his failure to prepare, place in the Station’s public file, and file electronically with the Commission the Station’s Children’s Television Programming Reports in a timely manner. The Licensee admits to having committed the violations, but takes issue with the amount of the forfeiture imposed against him by the Bureau.<sup>4</sup>

2. In the AFR, the Licensee maintains that the Bureau’s imposition of the forfeiture was: (a) inconsistent with prior Commission precedent, in violation of *Melody Music*<sup>5</sup> and the Equal Protection Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution; and (b) arbitrary and capricious, and accordingly in violation of Section 706(2)(A) of the Administrative Procedure Act.<sup>6</sup> He also argues, for the first time, that the Bureau’s action violated the Due Process Clause of the Fifth Amendment in that the Commission did not provide him “fair notice” of the *amount* of the forfeiture for the violations of the rules that he acknowledges to have committed.<sup>7</sup> Because he failed to make this notice argument to the Bureau,<sup>8</sup> it never had the opportunity to pass on that contention. Accordingly, the Licensee may not

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<sup>1</sup> *Ernesto Bustos*, Memorandum Opinion and Order, DA 14-716 (Vid. Div. Jun. 18, 2014)) (“*Memorandum Opinion and Order*”).

<sup>2</sup> *Ernesto Bustos*, Forfeiture Order, 29 FCC Rcd 1898 (Feb. 24, 2014) (“*Forfeiture Order*”).

<sup>3</sup> 47 C.F.R. § 73.3526(e)(11)(iii).

<sup>4</sup> Licensee Response to Letter of Inquiry (Apr. 6, 2012) at 3.

<sup>5</sup> *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

<sup>6</sup> 5 U.S.C. § 706(2)(A).

<sup>7</sup> AFR at 9-11.

<sup>8</sup> The Licensee did argue to the Bureau that it had failed to receive “fair notice” that his late filing of the reports (as distinguished from the failure to file them at all) in question could subject him to a forfeiture, a contention which the Bureau rejected in paragraphs 16-17 of the *Forfeiture Order*, and on reconsideration, as noted in paragraph 10 of the Memorandum Opinion and Order. The Licensee does not further argue this point in his AFR. However, in the

introduce it here. To the extent that the AFR contains this argument, we dismiss the AFR. *See* 47 C.F.R. § 1.115(c).<sup>9</sup>

3. Upon consideration of the Application for Review and the entire record, we conclude that the Licensee has not demonstrated that the Bureau erred. The Bureau, in the *Memorandum Opinion and Order*, properly decided the matters raised, and we uphold its decision for the reasons stated therein.

4. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Sections 1.115(b) and (c) of the Commission's rules, 47 C.F.R. §§ 1.115(b),(c), to the extent noted in paragraph 2 and footnote 8, the Application for Review of Ernesto Bustos IS DISMISSED IN PART and, in all other respects, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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AFR, in addition to framing the two issues discussed in the text, the Licensee “incorporates by reference all of the legal arguments made in both of his May 17, 2013 ‘Response’ to the Notice of Apparent Liability in this proceeding and the March 26, 2014 ‘Petition for Reconsideration’ of the ‘Forfeiture Order’ in this proceeding.” AFR at 3. Section 1.115(b) of the rules requires that an application for review “shall concisely and plainly state the questions presented for review” and that the party seeking review must “specify, with particularity,” the grounds on which Commission consideration is warranted. 47 C.F.R. §§ 1.115(b). Because the Licensee’s attempted incorporation by reference of his many evolving arguments presented during the course of this proceeding and rejected by the Bureau fails to comply with these requirements, we dismiss the AFR to the extent that it seeks to incorporate by reference his arguments made in previously filed pleadings. *Tama Radio Licenses of Tampa, Florida, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7588 (2010) (“The Commission is not required to sift through an applicant’s prior pleadings to supply the reasoning that our rules require be provided in an application for review.”).

<sup>9</sup> As a separate and independent response to this argument, the Licensee did receive such notice regarding the possible forfeiture amount. As discussed at paragraph 7 of the Notice of Apparent Liability for Forfeiture, DA 13-779 (MB 2013) and paragraph 12 of the *Forfeiture Order*, the Commission’s *Forfeiture Policy Statement* provides the base forfeiture amounts for the violations in question, as adjusted upward or downward by considering the factors in Section 503(b)(2)(E) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(2)(E), depending on the specific nature of the violations and violator at issue. *See Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(8), note to paragraph (b)(8), Section I.